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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/540,094	03/23/2006	Simon Reginald Hall	9276/HO-P03188US0	6440

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FULBRIGHT & JAWORSKI, LLP
1301 MCKINNEY
SUITE 5100
HOUSTON, TX 77010-3095

EXAMINER	
SAYALA, CHHAYA D	
ART UNIT	**PAPER NUMBER**
1794	

NOTIFICATION DATE	DELIVERY MODE
01/29/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

nstacey@fulbright.com
twrye@fulbright.com
hoipdocket@fulbright.com

Office Action Summary	Application No.	Applicant(s)	
	10/540,094	HALL, SIMON REGINALD	
	Examiner	Art Unit	
	C. SAYALA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11/9/2009*.

2a)☒ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *3-8,10,11 and 14* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *3-8,10,11 and 14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/24/2009 has been entered.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

1. Claims 3-8, 10-11 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 01/97630 in view of Jewell et al. (US Patent 6410063) and further in view of Romsos et al. (JAVMA, vol. 182(1), pp. 41-43, 1983) and Wills, ("Adult Maintenance," BSAVA Manual of Companion Animal Nutrition & Feeding, Chapter 3; British Small Animal Veterinary Association 1996, pgs 44-46), Rice ("The Dog Handbook", pages 48-49, published by Barron's Educational Series, 1999) and JP 02238464.

WO '630 offers pet food compositions with differing macronutrient contents, one composition being higher in protein and another being higher in fat. See page 4. The patent also discloses a multipack for pets (page 6, line 20+) with different compositions, differing in protein and fat contents as shown on page 8. Note that example 1, protein up to 70% is disclosed as well as fat up to 90. The patent discloses varying carbohydrate contents at Example 3, even though the patent discloses that the food contains carbohydrate (page 3, line 11+), but fails to disclose the amount specifically. The reference teaches compositions differing in fat content and protein content by 5%. See examples and page 4, last paragraph. Such disclosure renders obvious claims 3-5. With regard to claim 6 and claim 11, see page 5, lines 13-14 that discloses snacks such as cereal bars and page 6, line 21 to page 7, line 6, wherein it is disclosed that multi-packs can have individually packaged food packs.

Jewell et al. specifically teach a food composition for cats which includes carbohydrate in an amount 1-20%, protein 25-70% and fat 25-75%. The composition is said to help maintain the cat's health and induces a state of ketosis. Taken together with the above references, to incorporate these amounts for the carbohydrate as a macronutrient for the pet food and to provide varying amounts as for protein and fat would have been obvious to one of ordinary skill in the art at the time the invention was made i.e. to repeat the teachings of the WO patent for the third macronutrient would not have required more than ordinary skill. Although the reference teaches using these diets one per day and not all simultaneously, based on the following references, offering

these foods simultaneously would have been beneficial and such a concept would have become immediately obvious to the practitioner.

In this regard, Romsos et al. disclose that animals such as rats and dogs are able to self-select their diet and are able to regulate their protein and energy intake by self-selection when allowed free-choice feeding. The dogs under this study were able to regulate their protein intake and establish a pattern in a week of the study. Rosmos states "It is well established that animals, including dogs, are able to regulate their intake of energy. When the energy density of the diet is lowered, dogs consume more food to maintain approximately the same energy intake". (Page 41). Rosmos indicates that animals when permitted to self select from 2 or more diets were offered that differed in concentration of protein, animals were able to self-select the desired concentration of protein without affecting energy intake. Even though Rosmos teaches a protein-based study to extend the concept of self-selection to other macronutrients also would have been obvious.

Therefore, if the food containing the varying macronutrient contents, carbohydrate, fat and protein contents as shown by the primary references were to be offered in a free-choice feeding method so that the dogs/cats are able to self-select their diet then it can be reasonably expected that they would be driven by their nutrient intake/requirement. The reference of Wills teaches that cats often detect nutritional deficiencies in their diets and have the ability to reject such diets, thus showing that animals opt for diets that are complete in the nutrients they need and would have been capable of self-regulating their diets based on nutrient content, which can reasonably be

expected to mean that their self-selection would be based on their innate requirement for optimal nutrients. The reference of Rice shows that “free-choice” feeding of dogs was a known method of feeding dogs *to prevent obesity and overeating*. For all these benefits, self-selection would have been the process of choice.

The JP patent describes separately packaging or a single packaging of more than one type of food for a cat that can be consumed either in 1 day or as one meal. The food can be dried or not and can be 5 or more different types of food. The pet foods are provided as main meals and side dishes. Note that the examples show placing the variety of foods for cats and allowing the cats to make their choice. Based on palatability the example finds that the “optimal food dish” selected was fish over seaweed and shrimp, thus increasing its appetite for the foods offered. Such disclosure shows that the animal has the ability to select the optimal type of food for itself, that offering a variety of different types of foods was already being practiced in the art and taken with the above references that also show such a concept of a variety of foods being offered, it would have been obvious to formulate a composition of a variety of foods with different amounts of macronutrients based on the fact that the animal has the ability based on Wills, Rosmos, Rice and the JP patent disclosure to feed itself the preferred macronutrient at its optimal level.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11

F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 3-8, 10-11 and 14 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13, 15-16 of copending Application No. 10/742360. Although the conflicting claims are not identical, they are not patentably distinct from each other because while the instant application is drawn to an animal, the co-pending case claims “a feline animal”, which is rendered obvious by the claiming of an animal.

3. Claims 3-8, 10-11 and 14 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3 and 8 of U.S. Patent No. 10/540095 in view of Rosmos et al. Although the conflicting claims are not identical, they are not patentably distinct from each other because while the instant application is drawn to “providing” multi-component foodstuff, “allowing” the dog to eat, and basing the dog’s selection upon the protein content of the food, the ‘095 also claims “providing” different compositiosn of food, wherein the animal selects the food and “allowing” the animal to consume the food and determining the amounts of nutrients consumed. While the ‘095 application does not claim the dog’s selection on protein content of the food, Rosmos et al. teach that animals when permitted to self select from

2 or more diets were offered that differed in concentration of protein, animals were able to self-select the desired concentration of protein without affecting energy intake, rendering obvious the instant claims in view of the '095 application.

Response to Arguments

Applicant's arguments filed 11/24/2009 have been fully considered but they are not persuasive.

Only those references that are still applied above are being responded to. WO '630 has been characterized as being directed to a dietary regime with one food being fed as a morning meal and another as an afternoon/evening meal. Nonetheless, the reference teaches the pet food compositions with varying fat and protein contents as claimed herein, the reference teaches multi-packs with individual packs being packaged as claimed herein. Although these foods are offered in rotation, its macronutrient preference was still based on its selectivity of these diets with varying amounts of protein and fat. Such a teaching has been combined with the teachings of the other references applied. Applicant appears to have considered each reference separately although the rejection is under 35 USC 103 and it is the combined teachings that need to be considered. Under 35 USC 103, a reference must be considered not only for what it expressly teaches, but also for what it fairly suggests. *In re Burckel*, 592 F.2d 1175, 1179, 201 USPQ 67, 70 (CCPA 1979). Rice has been used to show that free-choice feeding is beneficial in maintaining the weight of the animal. As for the Wills reference, applicant's remarks pointing to parts of the Wills reference that teach feeding

dogs with "good enough" appetites or that low protein diets are reject ted because of their unpalatability and the conclusion that Wills teaches that the owner supply "one pet food product per meal" cannot be used as the reason for allowance because Wills teaches at page 46, the following:

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Sayala, whose telephone number is (571) 272-1405. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. SAYALA/
Primary Examiner, Art Unit 1794